IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 442

SCHWEGMANN BROTHERS, ET AL.,
Petitioner,

versus

CALVERT DISTILLERS CORPORATION,
Respondent,

and

No. 443

SCHWEGMANN BROTHERS, ET AL.,
Petitioner,

versus

SEAGRAM-DISTILLERS CORPORATION,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF ON BEHALF OF LOUISIANA STATE PHARMACEUTICAL ASSOCIATION, AMICUS CURIAE

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This brief is filed on behalf of the Louisiana State Pharmaceutical Association, a Louisiana corporation organized in 1884. The active membership is composed

of pharmacists and qualified assistant pharmacists practicing in Louisiana.

As stated in the briefs on behalf of petitioner and respondents, these cases are before this Court on writs to the United States Court of Appeals for the Fifth Circuit granted February 26, 1951. The opinion of the Court of Appeals for the Fifth Circuit, affirming the judgment of the United States District Court for the Eastern District of Louisiana, is reported in 184 F(2d) 11 (1950).

The jurisdiction of this Court is founded on the provisions of 28 U. S. C. 1254 (1).

STATEMENT OF THE CASE

These two suits for injunctions were brought under Louisiana Act 13 of 1936, now La. R. S. 51: 391-396, the Louisiana Fair Trade Act.[1] The purpose of the suits was to obtain relief from price cutting by Schwegmann Brothers. Calvert and Seagram (Maryland and Delaware corporations, respectively) are distributors of alcoholic beverages, and Schwegmann Brothers is a Louisiana partnership operating a super-market in New Orleans.

Calvert and Seagram established fair trade prices on certain whiskies and Schwegmann sold the liquors

[1] Appendix A.

in question at cut-rate prices below the established minimum, with full knowledge that fair trade prices had been established through contracts with other Louisiana retailers. This is conceded by Schwegmann Brothers, who contend that they are not governed by the Louisiana Fair Trade Act because they did not sign contracts with Seagram and Calvert agreeing to the Fair Trade prices.

As conceded by Schwegmann Brothers in their brief (p. 3), the Louisiana Fair Trade Act is typical of fair trade statutes in forty-five states. It contains two basic provisions: Section 1, providing that fair trade contracts meeting certain specified conditions shall not be invalid by reason of establishing minimum resale prices; and Section 2, providing that knowingly selling at less than the fair trade price established pursuant to Section 1 is unfair competition actionable by anyone damaged thereby.

In the Fifth Circuit Court of Appeals Schwegmann Brothers limited their position to two contentions: (1) that the contracts between Calvert and Seagram and various Louisiana retailers were invalid because of lack of mutuality, and (2) that the Miller-Tydings Amendment[1] to the Sherman Act[2] legalizes only *contractual* fair trade and does not authorize fair trade as to a non-contracting retailer. As the first point is not covered by the Schwegmann Brothers brief in this Court, it has evidently been abandoned.

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[1] Act Aug. 17, 1937, C. 690 Title VIII 50 Stat. 693, 15 U. S. C. Sec. 1.
[2] Act July 2, 1890, C. 647, 26 Stat. 209, 15 U. S. C. Secs. 1-7.

Hence, their position now rests exclusively on the second point.

The basic position of Schwegmann Brothers, therefore, is that *some violation of the Sherman Act* deprives Seagram and Calvert of their right to protect their products against cut-rate sales by a non-contracting retailer.

QUESTION PRESENTED

According to the brief filed on behalf of Schwegmann Brothers (p. 2), the question presented is as follows:

> "The Miller-Tydings Amendment excepts from the Sherman Act resale price maintenance by 'contracts or agreements'. Does this exception extend to resale price maintenance imposed on unwilling, non-contracting parties under the non-signer clause of the Louisiana Fair Trade Act?"

While this is undoubtedly the question presented by the Schwegmann Brothers brief, it is *not* the basic question presented by these cases.

Calvert and Seagram entered into fair trade contracts with Louisiana retailers other than Schwegmann Brothers. These contracts met all requirements of the Louisiana Fair Trade Act; and under the provisions of the Miller-Tydings Amendment these

contracts were *expressly authorized* and did not violate the Sherman Act.

The real question then, is whether a violation of the Sherman Act occurred by virtue of the fact that the Louisiana Legislature provided in Section 2 of the Louisiana Fair Trade Act that noncontracting retailers are guilty of unfair competition when they sell at cut rate prices below the minimums established in accordance with the provisions of Section 1.

No contention is made by Schwegmann Brothers that the Louisiana Fair Trade Act is *unconstitutional.* As a matter of fact, its constitutionality and effectiveness against non-contracting retailers have been upheld under Louisiana law in *Pepsodent Co. and International Cellucotton Products Co. vs. Krauss Co.*, 200 La. 959, 9 So. (2d) 303, recently referred to with approval in *Schwegmann Bros. vs. Louisiana Board of Alcoholic Beverage Control*, 216 La. 148, 43 So. (2d) 248. The *Pepsodent* case was followed by the Fifth Circuit Court of Appeals in *Mennen Co. and Bristol-Meyers Co. vs. Krauss Co.*, 134 F. (2d) 348.

In *Old Dearborn Distributing Co. vs. Seagram-Distillers Corp.*, 299 U. S. 183, 57 S. Ct. 139, and in *Pep Boys, etc., vs. Pyroil Sales Co., and Kunsman vs. Max Factor & Co.*, 299 U. S. 198, 57 S. Ct. 147, it was held that state fair trade statutes of this kind do not violate the Constitution of the United States. And as stated in the opinion of the Fifth Circuit Court of Appeals in the cases presently under review, "It is

not for one who asserts rights under a state statute to prove as a condition precedent to its enforcement that the legislature had a right to enact it. He may stand upon the presumption of validity until such presumption is overthrown. This is especially so in this case since it is admitted, as indeed it must be, that unless it is prohibited by federal law, the Louisiana Fair Trade law has been already determined to be a valid law in the state of Louisiana binding on consenters and non-consenters alike as a declaration of state fair trade policy which the state is competent to make."

The exhaustive brief filed on behalf of Schwegmann Brothers fails to meet squarely the issue of *whether there has been a violation of the Sherman Act* by Calvert, Seagram or the Louisiana Legislature. On the contrary, Schwegmann Brothers start backwards, with the amendment to the Sherman Act, and argue that if the binding of non-contracting retailers is not expressly authorized by the amendment, then and for that reason the binding of non-contracting retailers is illegal. *For purposes of these cases, this is not so unless the Sherman Act itself makes the binding of non-contracting retailers illegal!*

Calvert and Seagram have entered into contracts *specifically authorized by the Miller-Tydings Amendment to the Sherman Act and by the Louisiana Fair Trade Act.* Have they thereby committed a violation of the Sherman Act, subjecting them to the penalties of a $5,000 fine or imprisonment up to one year, or both? Does the fact that the *Louisiana Legislature*

acted to bind non-contracting retailers make Calvert and Seagram guilty of a criminal offense?

ARGUMENT

1. The Sherman Act is Penal in Nature and Should be Strictly Construed

The Sherman Act is penal in nature, Section 1 thereof providing a penalty of $5,000.00 or one year in jail or both; hence, it is subject to a strict construction. *United States v. Swift, et al.*, 188 Fed. 92; *Toulmin, Anti-Trust Laws of the United States*, Vol. 1, p. 191, Sec. 8.8.

It is stated in the brief filed on behalf of Schwegmann Brothers (p. 28) that "The Court . . . construes the Sherman Act broadly . . .", but no authorities are cited in actual support of this statement. The Sherman Act may be "a great declaration of national policy" and the prohibition of monopolies may represent a broad policy of the Congress, as indicated in the cases cited. But this does not mean that a criminal statute should be broadly construed to bring within its scope acts which are not clearly embraced by its provisions.

In *Northern Securities Co. v. United States*, 193 U. S. 197, 24 S. Ct. 436, this court clearly regarded the Sherman Act as a criminal statute, stating that the rule of strict construction "means only that we must not bring cases within the provisions of such a statute

that are not clearly embraced by it, nor by narrow, technical or forced construction of words, exclude cases from it that are obviously within its provisions. What must be sought for always is the intention of the Legislature, and the duty of the Court is to give effect to that intention as disclosed by the words used". 193 U. S. at p. 358. In his dissenting opinion Mr. Justice Holmes said "The statute of which we have to find the meaning is a criminal statute". 193 U. S. at p. 401.

2. What Does Section One of the Sherman Act Prohibit?

Section 1 of the amended Sherman Act,[1] upon which the position of Schwegmann Brothers rests, prohibits (a) *contracts*, (b) *combinations*, and (c) *conspiracies* in restraint of trade or commerce. However, as amended by the Miller-Tydings Act, this section specifically authorizes contracts or agreements prescribing minimum prices for the resale of commodities bearing the trade mark, brand or name of the producer or distributor, when the commodities in question are in free and open competition with other commodities of the same general class, and when the contracts in question are lawful as applied to intrastate transactions under any statute, law, or public policy in any state, etc., where the resale is to be made. The first sentence of Section 1 reads:

> "Every contract, combination in the form of trust, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

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[1] Appendix B.

Since the contracts which Calvert and Seagram made with retailers other than Schwegmann are clearly legal under both state and federal law, Calvert and Seagram are entitled to injunctive relief unless they committed some other specific act which was a violation of the Sherman Act.

The provision by the Louisiana Legislature that non-contracting retailers shall be bound by the fair trade minimum in a valid contract is clearly not a violation of the Sherman Act, for the simple reason that such legislative provision is not a "contract, combination or conspiracy", and is entirely beyond the scope of the Sherman Act.

In *Parker vs. Brown*, 317 U. S. 341, 63 S. C. 307 this Court held that a proration program for marketing raisins, established by a California statute, was not in violation of the Sherman Act. Counsel for Schwegmann Brothers attempt to distinguish this case on the theory that in *Parker vs. Brown* there was "*state action, not action by private individuals*". However, in the cases presently under consideration Schwegmann was bound not by any action on the part of Calvert or Seagram, but rather by Section 2 of the Louisiana Fair Trade Act. In other words, it was "state action" in the instant cases which bound Schwegmann and not the action of private individuals. Calvert and Seagram, it is true, entered into *legal* fair trade contracts with retailers other than Schwegmann; but they entered into no illegal *contract, combination* or *conspiracy* whatever which bound Schwegmann Brothers.

It has properly been stated that no state can sanction a violation of the Sherman Act through legislation endorsing actions which constitute violations. However, it is obvious that Seagram and Calvert have taken no step violating the Sherman Act, and the action of the Louisiana Legislature does not operate in any way to sanction or attempt to legalize a violation of the Sherman Act.

The following language of this court in *Parker vs. Brown*, is most pertinent (317 U. S. 341, at 350):

> "Section 1 of the Sherman Act, 15 U. S. C. Section 1, makes unlawful 'every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States.' And Section 2, 15 U. S. C. Section 2, makes it unlawful to to 'monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States.' We may assume for present purposes that the California prorate program would violate the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate. We may assume also, without deciding, that Congress could, in the exercise of its commerce power, prohibit a state from maintaining a stabilization program like the present because of its effect on interstate commerce. Occupation of a legislative 'field' by Congress in the exercise of a granted power is a familiar example of its constitutional power to suspend state laws. See *Adams Express Co. v. Croninger*, 226 U. S. 491, 505; *Napier v. Atlantic Coast Line*, 272 U. S. 605, 607; *Missouri Pacific R. Co. v. Porter*, 273 U. S. 341;

Illinois Gas Co. v. Public Service Co., 314 U. S. 498, 510.

"But it is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

"The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. The Act is applicable to 'persons' including corporations (Sec. 7), and it authorizes suits under it by persons and corporations (Sec. 15). A state may maintain a suit for damages under it, *Georgia v. Evans*, 316 U. S. 159, but the United States may not, *United States v. Cooper Corp.*, 312 U. S. 600—conclusions derived not from the literal meaning of the words 'person' and 'corporation' but from the purpose, the subject matter, the context and the legislative history of the statute.

"There is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only

'business combinations'. 21 Cong. Rec. 2562, 2457; see also at 2459, 2461. That its purpose was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations, abundantly appears from its legislative history. See *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 492-93 and n. 15; *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, affirmed 175 U. S. 211; *Standard Oil Co. v. United States*, 221 U. S. 1, 54-58.

"True, a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful, *Northern Securities Co. v. United States*, 193 U. S. 197, 332, 344-47; and we have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade, cf. *Union Pacific R. Co. v. United States*, 313 U. S. 450. Here the state command to the Commission and to the program committee of the California Prorate Act is not rendered unlawful by the Sherman Act since, in view of the latter's words and history, it must be taken to be a prohibition of individual and not state action. It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the the program and which enforces it with penal sanctions, in the execution of a governmental policy. The prerequisite approval of the program upon referendum by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the

Sherman Act prohibits. The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application. The required vote on the referendum is one of these conditions. Compare *Currin v. Wallace,* 306 U. S. 1, 16; *Hampton & Co. v. United States,* 276 U. S. 394, 407; *Wickard v. Filburn,* ante, p. 111.

"The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit. *Olsen v. Smith,* 195 U. S. 332, 344-45; cf. *Lowenstein v. Evans,* 69 F. 908, 910.

It is to be noted that in the dissenting opinion of Judge Russell in the present cases, he concedes that:

"Section 2 of the Louisiana statute, upon which the present cause is predicated, is a substantive law of Louisiana, not a contract or agreement."

In *Northern Securities Co. vs. United States,* 193 U. S. 197, 24 S. Ct. 436, this Court pointed out that the first section of the Sherman Act makes a difference between a contract and a combination or conspiracy in restraint of trade. but:

"The words hit two classes of cases and only two—contracts in restraint of trade and combinations or conspiracies in restraint of trade."

3. Legislative History

The Sherman Act, as amended by the Miller-Tydings Act, is clear and unambiguous and does not prohibit any act performed or any action taken by Seagram or Calvert. But if legislative history is resorted to for the purpose of determining the intention of Congress in adopting the Miller-Tydings Amendment, it will be found that Congress intended to remove every prohibition from the enactment by the States of fair trade laws, binding alike upon signers and non-signers. This question was reviewed exhaustively in *Pepsodent Co. vs. Krauss Co.*, 56 F. Supp. 922 (D. C. La. 1944), by Judge Wayne G. Borah, now a member of the Fifth Circuit Court of Appeals.

Specific and extensive references to the legislative history are made in other briefs in these cases, but the following summary is of assistance in obtaining a comprehensive view of the purpose and intent of the Miller-Tydings amendment (*Toulmin, Anti-Trust Laws of the United States,* Volume 1, (1949)):

p. 233, Sec. 10.2, et seq.:

> "The legislative intent of the Miller-Tydings Act was to remove every obstacle which would hinder the free enforcement by the states of provisions of their local fair trade acts.
>
> "Congress made legal a specific type of contract or agreement—the resale price maintenance contract—which prior to the amendment was illegal in interstate commerce.

"The general purpose of the amendment was to provide for the right of any manufacturer or distributor of a commodity marked with the name, trade mark, brand, or other identification of such producer or distributor, to control the resale price of such goods by an agreement between such producer and his next stage of distribution.

Prior to the enactment of the Miller-Tydings Act, it was illegal for any one to agree with another as to maintenance of a resale price. Under many state laws it was legal to control resale prices as to intrastate commerce, but it was illegal to do the same thing in interstate commerce.

"It should be noted that under the Miller-Tydings Act—

"(1) The commodity must bear the identification (trade mark, brand, or name) of the producer or distributor.

"(2) The commodity must be in free and open competition with commodities of the same general class produced or distributed by others.

"(3) The resale must be in states where resale price maintenance contracts are legal.

"(4) Horizontal agreements are prohibited.

"Prior to the amendment of section 1 of the Sherman Act, contracts fixing resale prices were void and an unfair method of competition.

"The Miller-Tydings Act removed the bar of illegality to the making of minimum resale price maintenance contracts covering commodities sold in interstate commerce if they were to be resold in a state

where such contracts had been legalized with respect to intrastate sales.

"Such laws—laws declaring as not in violation of the law of the particular state certain kinds of resale price maintenance contracts and providing that nonsigners of such contracts with knowledge thereof should be bound by the price stipulations therein—were on the statute books of forty-five states as of May 1, 1941. Missouri, Texas, Vermont, and the District of Columbia do not have a law of this kind.

"The first of such laws was enacted in California in 1931, without inclusion of the nonsigner clause, which was added by amendment in 1933. Similar acts, including the nonsigner provision, were thereafter enacted by other states."

p. 242, Sec. 12.2, et seq.:

"The two proviso clauses were added (to Section 1 of the Sherman Act) by the Miller-Tydings Act of August 17, 1937.

"The general purpose of the amendment was to provide for the right of any manufacturer or distributor of a commodity marked with the name, trade mark, brand or other identification of such producer or distributor to control the resale price of such goods so marked by an agreement entered into between such producer or distributor and his next stage of distribution, that is, with his wholesale or retail dealer.

"Prior to the enactment of the Miller-Tydings Act it was illegal in interstate commerce to agree with another as to the maintenance of the resale price. Under many state laws it was legal to control resale

prices as to intrastate commerce, but it was illegal to do the same thing in interstate commerce.

"A producer or distributor may not agree, however, with his competitors as to resale prices.

"The legislative history of the Miller-Tydings amendment to the Sherman Act discloses congressional intent to remove every obstacle which would hinder free enforcement by the States of provisions of their local fair trade Acts in such fashion as their respective Legislatures see fit."

4. The Wisdom of Fair Trade

There are many sound and compelling reasons why fair trade laws are desirable. But assuming that there are persuasive arguments to the contrary, the *wisdom* of the policy authorizing fair trade is not at issue, as Congress and forty-five states, including Louisiana, have expressly sanctioned fair trade minimum prices.

In the brief filed on behalf of Schwegmann Brothers counsel concede (p. 29):

> *"In construing the law in this case, petitioners do not ask the Court to pass on the wisdom of the law."*

But a very substantial portion of their brief is apparently devoted to an effort to show that if fair trade is permitted to survive, the entire economic structure of the United States will crumble.

In *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 US 183, 57 S. Ct. 139, this Court maintained the validity of the Illinois Fair Trade Act in proceedings against a non-contracting retailer. No violation of the Sherman Act was urged in that case, but since the Illinois statute and the Louisiana statute presently under consideration are virtually identical, the court's analysis of the Fair Trade Act is pertinent (299 US at 188 et seq.):

"Section 1 affirms the validity of contracts of sale or resale of commodities identified by the trade-mark, brand or name of the producer or owner, which are in fair and open competition with commodities of the same general class produced by others, notwithstanding that such contracts stipulate (1) that the buyer will not resell except at the price stipulated by the vendor; and (2) that the producer or vendee of such a commodity shall require, upon the sale to another, that he agree in turn not to resell except at the price stipulated by such producer or vendee. It is clear that this section does not attempt to fix prices, nor does it delegate such power to private persons. It *permits* the designated private persons to contract with respect thereto. It contains no element of compulsion but simply legalizes their acts, leaving them free to enter into the authorized contract or not as they may see fit. Thus far, the act plainly is not open to objection; and none seems to be made.

"The challenge is directed against section 2, which provides that wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any

contract made under Section 1, whether the person doing so is or is not a party to the contract, shall constitute unfair competition, giving rise to a right of action in favor of anyone damaged thereby.

"It is first to be observed that Section 2 reaches not the *mere* advertising, offering for sale or selling at less than the stipulated price, but the doing of any of these things *wilfully and knowingly*. We are not called upon to determine the case of one who has made his purchase in ignorance of the contractual restriction upon the selling price, but of a purchaser who has had definite information respecting such contractual restriction and who, with such knowledge, nevertheless proceeds wilfully to resell in disregard of it.

"In the second place, Section 2 does not deal with the restriction upon the sale of the commodity qua commodity, but with that restriction because the commodity is identified by the trademark, brand or name of the producer or owner. The essence of the statutory violation then consists not in the bare disposition of the commodity, but in a forbidden use of the trade-mark, brand or name in accomplishing such disposition. The primary aim of the law is to protect the property—namely, the good will—of the producer, which he still owns. The price restriction is adopted as an appropriate means to that perfectly legitimate end, and not as an end in itself.

"Appellants here acquired the commodity in question with full knowledge of the then-existing restriction in respect of price which the producer and wholesale dealer had imposed, and, of course,

with presumptive if not actual knowledge of the law which authorized the restriction. Appellants were not obliged to buy; and their voluntary acquisition of the property with such knowledge carried with it, upon every principle of fair dealing, assent to the protective restriction, with consequent liability under Section 2 of the law by which such acquisition was conditioned. *Cf. Provident Inst. for Savings v. Jersey City*, 113 U. S. 506, 514, 515, 28 L. ed. 1102, 1105, 1106, 5 S. Ct. 612; *Vreeland v. O'Neil*, 36 N. J. Eq. 399, 402, same case on appeal, 37 N. J. Eq. 574, 577."

* * * * * * * *

"Nor is Section 2 so arbitrary, unfair or wanting in reason as to result in a denial of due process. We are here dealing not with a commodity alone, but with a commodity plus the brand or trade-mark which it bears as evidence of its origin and of the quality of the commodity for which the brand or trade-mark stands. Appellants own the commodity; they do not own the mark or the good will that the mark symbolizes. And good will is property in a very real sense, injury to which, like injury to any other species of property, is a proper subject for legislation. Good will is a valuable contributing aid to business—sometimes the most valuable contributing asset of the producer or distributor of commodities. And distinctive trade-marks, labels and brands, are legitimate aids to the creation or enlargement of such good will. It is well settled that the proprietor of the good will 'is entitled to protection as against one who attempts to deprive him of the benefits resulting from the same, by using his labels and trade-mark without his consent and

authority.' *McLean v. Fleming*, 96 U. S. 245, 252, 24 L. ed. 828, 831. 'Courts afford redress or relief upon the ground that a party has a valuable interest in the good-will of his trade or business, and in the trade-marks adopted to maintain and extend it.' *Hanover Star Mill. Co. v. Metcalf*, 240 U. S. 403, 412, 60 L. ed. 713, 717, 36 S. Ct. 357. The ownership of the good will, we repeat, remains unchanged, notwithstanding the commodity has been parted with. Sec. 2 of the act does not prevent a purchaser of the commodity bearing the mark from selling the commodity alone at any price he pleases. It interferes only when he sells with the aid of the good will of the vendor; and it interferes then only to protect that good will against injury. It proceeds upon the theory that the sale of identified goods at less than the price fixed by the owner of the mark or brand is an assault upon the good will, and constitutes what the statute denominates 'unfair competition.' See *Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Marketing Asso.* 276 U. S. 71, 91, 92, 96, 97, 72 L. ed. 473, 480-483, 48 S. Ct. 291. There is nothing in the act to preclude the purchaser from removing the mark or brand from the commodity—thus separating the physical property, which he owns, from the good will, which is the property of another—and then selling the commodity at his own price, provided he can do so without utilizing the good will of the latter as an aid to that end.

"There is a great body of fact and opinion tending to show that price cutting by retail dealers is not only injurious to the good will and business of the producer and distributor of identified goods,

but injurious to the general public as well. The evidence to that effect is voluminous, but it would serve no useful purpose to review the evidence or to enlarge further upon the subject. True, there is evidence, opinion and argument to the contrary; but it does not concern us to determine where the weight lies. We need say no more than that the question may be regarded as fairly open to differences of opinion. The legislation here in question proceeds upon the former and not the latter view; and the legislative determination in that respect, in the circumstances here disclosed, is conclusive so far as this court is concerned."

In *Ely Lilly & Co. vs. L. S. Saunders*, 216 N. C. 163, 4 SE (2d) 528, 125 A. L. R. 1308, the Supreme Court of North Carolina, in an unusually well considered and exhaustive opinion, held that the North Carolina Fair Trade Act was valid and enforceable, as to both contracting and non-contracting retailers. The following language from that opinion is pertinent: (125 A. L. R. at 1316 et seq.):

"The agreements authorized by the law are vertical, between manufacturers or producers of the particular branded commodity and those handling the product in a straight line down to and including the retailer; not horizontal, as between producers and wholesalers or persons and concerns in competition with each other in dealing with like comodities. The law does not authorize cross agreements between competitors. Whatever agreements are permitted, all face one way; they apply only to commodities produced by the

manufacturer, bearing his trade-mark, brand, or name, and then only if they are in free and open competition with commodities of the same general class produced or distributed by others. The incidence of the law on trade, therefore, affects only that portion of the commodity in which the producer has already a lawful monopoly of ownership, and which goes into distribution in a volume which may be fairly measured by the popularity which the good will and identifying name have achieved, but which can never amount to the whole. *Old Dearborn Distributing Co. v. Seagram-Distillers Corp., supra; Joseph Triner Corp. v. McNeil,* 363 Ill. 559, 2 NE (2d) 929, 104 ALR 1435; *Max Factor & Co. v. Kunsman, supra.*"

* * * * * * * *

"It is not conceivable how any horizontal restriction of trade can be effected through the provisions of the statute. The restraint intended does not apply to the commodity, in its generic sense, upon which the manufacturer has expended his care and skill—it is the commodity plus the brand which identifies it, guarantees its quality, and is symbolic of the good will which rightfully belongs to the manufacturer. It is this alone which the statute desires to protect, and to the piratical use of which it applies restraint. As stated by Justice Sutherland in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp., supra* (299 US 183, 57 S. Ct. 145, 81 L. ed. 109, 106 ALR 1476): 'The ownership of the good will, we repeat, remains unchanged, notwithstanding the commodity has been parted with. Section 2 of the act does not prevent a purchaser of the commodi-

ty bearing the mark from selling the commodity alone at any price he pleases. It interferes only when he sells with the aid of the good will of the vendor; and it interferes then only to protect that good will against injury. It proceeds upon the theory that the sale of identified goods at less than the price fixed by the owner of the mark or brand is an assault upon the good will, and constitutes what the statute denominates "unfair competition." See *Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Marketing Ass'n*, 276 US 71, 91, 92, 96, 97, 48 S. Ct. 291, 295, 296, 297, 72 L. ed. 473. There is nothing in the act to preclude the purchaser from removing the mark or brand from the commodity—thus separating the physical property, which he owns, from the good will, which is the property of another—and then selling the commodity at his own price, provided he can do so without utilizing the good will of the latter as an aid to the end.'"

"The common law emphasis on forestalling 'regrating, engrossing and conspiracy to raise prices must not lead us to infer that the sole objective of public policy was to obtain the lowest possible price to the consumer on every commodity. This is both an economic fallacy and a misconception of law. The public is more interested in fair and reasonable prices which preserve the economic balance in advantages to all those engaged in the trade, with due regard to the consuming public, than it is in securing the lowest obtainable prices, when the inevitable tendency is to degrade or drive from the market 'articles which it is assumed to be desirable that the public should be able to get' (Justice Holmes, dissenting, in the Dr. Miles case).

On this phase of the subject the Supreme Court of the State of Washington in *Fisher Flour Milling Co. v. Swanson*, 76 Wash. 649, 137 P. 144, 151, 51 LRA (NS) 522, observed: 'Finally, it seems to us an economic fallacy to assume that the competition which, in the absence of monopoly, benefits the public, is competition between rival retailers. The true competition is between rival articles. . . . Fixing the price on all brands of high grade flour is a very different thing from fixing the price on one brand of high grade flour. The one means destruction of all competition and of all incentive to increased excellence. The other means heightened competition and intensified incentive to increased excellence.' Our own laws implementing this section of the Constitution recognize that price-cutting, not born of fair or normal competition, may indeed be piratical, and a dangerous step toward monopoly. C. S. Chap. 53, sec. 2563; *State v. Atlantic Ice & Coal Co.*, 210 NC 742, 188 SE 412."

* * * * * * * *

"Perhaps the most direct answer to the charge of monopoly made against this statute is contained in the provisions of the statute itself, under which it automatically ceases to operate where there is no competition. In a late case, *Goldsmith v. Johnson & Co.*, 7 A (2d) 176, Maryland Court of Appeals, June 28, 1939, decided since the case at bar was argued before this Court, this was thought to be a sufficient answer, and with this we agree."

* * * * * * * *

"The resale price is not fixed on any commodity, as such, and with respect to these the traditional

rules demanding freedom of trade remain uninvaded. It is placed only on the branded commodity; and this court, with the great majority of those which have preceded us in passing on similar laws, is of the considered opinion that the distinction is valid. Fixing the price, usually the most important incident of bargaining, and still so when the parties are equally related to the subject of the transaction is, in this instance, merely ancillary to the purpose of the law, which is to protect both the producer and the public —the one with respect to his good will, the other with respect to the quality and integrity of a desirable product. The restriction is imposed, as we have said, more with respect to the good will and brand than to the limited quantity of product, as such, which passes in the sale. A frank recognition of their relative importance demands that the minor consideration should give way, *ut res magis non pereat*. Laws protecting trademarks, trade-names and brands from piracy are of no avail whatever when the abuse of them by a purchaser of branded products is uncontrolled. The producer is less hurt by pilfering than he is by sabotage.

" 'There is nothing sacrosanct about price.' The right of the owner to fix a price on any commodity he sells is not absolute. To illustpate, if that were true the second Section of the Robinson-Patman Amendment, standardizing prices by prohibiting discriminations, would array that Act against both the Fifth and the Fourteenth Amendments of the Federal Constitution. It is a right created by law and subject to control by law when necessary to the just and orderly administration of government with due regard to constitutional guaranties. Price restrictions stand upon the same challenge before the law as any

other restraint upon the use of property, and are concerned with the same constitutional provisions."

* * * * * * * *

"In our opening analysis we stress the fact that the producer and seller of a branded commodity, along with the commodity itself, transfers the use of the good will, which use is made effectual by the use of the distinguishing brand or trade-mark. The quantity of commodity corporeally passed by the sale is always a relatively unimportant item, but the entire good will of the producer's business, with all of its force and effectiveness, is put behind the product in the hands of the retailer for use in inducing consumer purchase; and, conversely, the entire good will may be appropriated and prostituted by the cut rate dealer who uses it, not to promote the sale of the branded commodity, but to increase his sale in other commodities. In either case the entire good will is involved, and in a very real, if not technical, sense subjected to a servitude. On this principle there is no sound reason why, under favoring legislation, the parties should not be permitted to bargain with reference to the conditions upon which this servitude may be imposed, and none why this may not take the form of an agreement as to the resale price, the maintenance of which is to their mutual advantage. Some of the decisions find support for the provisions similar to those contained in Section Six in the principle that outside interference with such a contract is a proper subject for statutory prohibition, since, in somewhat similar circumstances, the court itself has afforded relief.

"In *Port Chester Wine & Liquor Shop, Inc. v. Miller Bros., Fruiterers, Inc.*, 253 App. Div. 188, 1 NYS (2d)

802, decided by the Appellate Division of the New York Supreme Court on 28 January, 1938, an action by a retail dealer against another retailer cutting resale prices was sustained under a similar act. Without deciding that particular question here, the situation is at least illustrative of the soundness of the law, and we may infer from the agreed facts here that a similar situation may exist among retailers who have complained to the plaintiff of the prevalence of this practice and threatened to discontinue handling the brands."

* * * * * * * *

"Nor is relevant the fact that prices on commodities described under Class III, which have been fixed by competing distributors, are within one cent of parity. In the absence of agreement to that effect this has not been considered by this court as sufficient even to support a charge of violating the Anti-Monopoly Statute C. S. Sec. 2559 et seq. *State v. Standard Oil Co. of New Jersey*, 205 NC 123, 126, 170 SE 134, and the Supreme Court of the United States is in accord. *United States v. American Tobacco Co.*, supra. This might occur through an unlawful agreement, certainly, if at all, dehors the operation of this law, or it might be the result of close competition as is now the case with the price of gasoline by the major oil companies, or it might be a case of 'follow the leader,' and it is not a violation of any law to copy the prices of a competitor.

"We have nothing to do with the expediency of an economic experiment. Discussions of this subject, on which thousands of articles have been written and hundreds of arguments made, has left the law-making bodies and most of courts convinced that

there is a field here in which the protection of private right and the promotion of the public welfare are not in irreconcilable conflict. The statute represents an attempt of the General Assembly to harmonize and apply these principles. In our opinion the provisions of the Constitution called to our attention do not defeat that legislative power. The propriety of its exercise is within the legislative discretion.

"We conclude therefore, that the statute under review is a constitutional and valid expression of the legislative will, and as such must be enforced."

5. Constitutionality of Louisiana Fair Trade Act Is Not at Issue

The constitutionality of the Louisiana Fair Trade Act, and particularly Section 2 thereof, is not at issue.

Perhaps Schwegmann Brothers could have taken the position in the District Court that any attempt on the part of the Louisiana Legislature to provide that non-contracting retailers should be bound was unconstitutional with respect to interstate transactions. It may be assumed that no plea of unconstitutionality has been raised for the simple reason that this court and the Louisiana Supreme Court and numerous other courts have frequently held that fair trade statutes are constitutional. In any event, no attack on constitutional grounds was made in the District Court; nor was it made before the Court of Appeals for the Fifth Circuit; nor is it made at the present time; nor can it be made now for the first time.

On page 22 of the brief filed on behalf of Schwegmann Brothers it is stated that, as to interstate commerce, Congress has occupied the legislative field and has barred the door to inconsistent state legislature, except as expressly authorized by the Miller-Tydings Act. This contention ignores the fact that the Miller-Tydings Amendment specifically legalizes the designated fair trade contracts when authorized by state statutes. Moreover, the Miller-Tydings Amendment certainly does not limit the validity of fair trade contracts to contracting parties only. As pointed out in the opinion rendered by the Fifth Circuit Court of Appeals in these cases, the Miller-Tydings Amendment "neither authorizes nor prohibits state legislation".

Substantial sections of the brief filed on behalf of Schwegmann Brothers are devoted to quotations from and references to legal periodicals, Fortune magazine, and the position of the Federal Trade Commission on the subject of whether or not Fair Trade is *desirable*. As pointed out by this Court in the *Old Dearborn* case, much can be said on both sides of this question. But this is not the present issue. When Congress approved fair trade authorized by local statutes or public policy, Congress expressed itself on the subject; and the fact that a writer for Fortune magazine disagrees with Congress as to the desirability of fair trade is not controlling. Congress spoke originally by enacting the Sherman Act, making contracts, combinations and conspiracies in restraint of trade or commerce illegal; but Congress subsequently enacted the Miller-Tyd-

ings amendment expressly excluding fair trade from the prohibitions of the Sherman Act, provided local statutes or public policy permitted fair trade.

Forty-five states have stated legislatively that their public policy permits fair trade, and the language of these statutes closely follows the language of the Miller-Tydings amendment. Again, the fact that the writers for Fortune magazine or certain legal periodicals may disagree with the legislatures of forty-five states does not control in determining whether or not fair trade is legal.

We reiterate that *the basic issue is not what is permitted by the Miller-Tydings Amendment, but rather what is prohibited by the Sherman Act.*

The Sherman Act was not designed to and did not provide that it is illegal for a state legislature to adopt a statute preventing non-contracting retailers from engaging in cut-throat price cutting of commodities bearing trade marks or trade names and protected by the fair trade laws approved by both Congress and the state legislature itself.

Seagram and Calvert entered into fair trade contracts with retailers other than Schwegmann Brothers, and these contracts were *expressly* and *admittedly* authorized by the Miller-Tydings Amendment and Section 1 of the Louisiana Fair Trade Act. *Did this make them guilty of a violation of the Sherman Act, punishable by the harsh penalties of a penal statute?*

Section 2 of the Louisiana Fair Trade Act provides as follows:

"Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of Section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

Did the enactment of this statute by the Louisiana Legislature make Calvert and Seagram guilty of a criminal act punishable by a fine of $5,000.00 or imprisonment for one year, or both?

CONCLUSION

This brief is filed on behalf of the pharmacists and assistant pharmacists of Louisiana, and their friends and associates. They are typical of the men and women throughout the United States who operate small businesses to earn a living. They are vitally interested in the outcome of this litigation because they realize that if fair trade is not sustained, they will fall easy prey to powerful predators who will pounce upon the opportunity to kill their means of livelihood.

No item can be fair traded unless it is in free and open competition with other commodities of the same class, produced by other manufacturers. This factor alone preserves the fair competition which protects the pub-

lic. No manufacturer is bound to fair trade his products and no manufacturer is bound by the fair trade price established by another manufacturer. If a fair trade price is too high, the competing producers are free to capture the market by establishing lower fair trade prices or none at all.

The cut-throat pirate who sells below the level of a reasonable profit does so to kill his competition. He usually does so either because he has tremendous size and purchasing power approaching monopoly, or because by selling certain articles at cut-throat prices he can deceive the public into believing that he sells all other items for less than reasonable prices.

However, apart from the desirability of fair trade or the undesirability of cut-throat competition are the issues involved in the cases presently under consideration. The sole issue before the Court is whether Seagram and Calvert have violated the Sherman Act, and it is clear that they have not. No issue involving the constitutionality of the Louisiana statute is before the Court.

It is respectfully submitted that the judgment of the Court below should be affirmed.

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Amicus Curiae.

CERTIFICATE

This is to certify that copies of this brief have been served on Counsel for Petitioner and Counsel for Respondents on this the 31st day of March, 1951.

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APPENDIX A

Louisiana Fair Trade Act

AN ACT

To protect trade mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade mark, brand or name.

Section 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Louisiana by reason of any of the following provisions which may be contained in such contract:

1. That the buyer will not resell such commodity except at the price stipulated by the vendor

2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

1. In closing out the owner's stock for the purpose of discontinuing delivering any such commodity.

2. When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

3. By any officer acting under the orders of any court.

Section 2. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of Section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

Section 3. This Act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

Section 4. The following terms, as used in this Act, are hereby defined as follows:

"Producer" means grower, baker, maker, manufacturer or publisher.

"Commodity" means any subject of commerce.

Section 5. If any provision of this Act is declared unconstitutional it is the intent of the Legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect.

Section 6. This Act may be known and cited as "Fair Trade Act." Approved by the Governor: June 26, 1936.

APPENDIX B

Section 1 of Sherman Anti-Trust Act, as amended by Miller-Tydings Act

(The provisions of the Miller-Tydings Amendment are italicized)

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal; *Provided, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45, as amended and supplemented, of this title: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity*

herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any such contract or engage in any such combination or conspiracy *hereby declared to be illegal* shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court.

E. S. UPTON PRINTING CO., NEW ORLEANS — 1933